

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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NICHOLAS BOROvac,  
Plaintiff,

v.

CHURCHILL COUNTY SCHOOL  
DISTRICT, et al.,  
Defendants.

3:11-cv-0336-LRH-VPC

ORDER

Before the court is defendants Carolyn Ross (“Ross”); Kevin Lords (“Lords”); and Churchill County School District’s (“CCSD”) (collectively “defendants”) motion to dismiss. Doc. #11.<sup>1</sup> Plaintiff Nicholas Borovac (“Borovac”) filed an opposition (Doc. #22) to which defendants replied (Doc. #26).

**I. Facts and Background**

On December 3, 2010, Borovac, then a senior within CCSD and a member of his school’s wrestling team, hazed and sexually harassed a fellow student and teammate while on an overnight wrestling trip. On December 10, 2010, Borovac was interviewed by defendant Lords, the school principal, about the incident and admitted to these transgressions. Thereafter, Borovac was disciplined by Lords, serving two (2) Saturday detentions and being banned from all overnight trips

<sup>1</sup> Refers to the court’s docket number.

1 with the wrestling team.

2 On December 21, 2010, defendant Lords again interviewed Borovac after the incident was  
3 reported to the media. On December 22, 2010, school was dismissed for winter break. On  
4 January 10, 2011, the day before school resumed, Lords contacted Borovac's parents and informed  
5 them that commencing January 11, 2011, Borovac was suspended from school for ten (10) days.  
6 Correspondence was sent confirming the suspension and setting a formal expulsion hearing for  
7 January 24, 2011. At the formal disciplinary hearing, defendant Lords presented the charges against  
8 Borovac, who was represented by counsel, and testified as to Borovac's confession. The  
9 disciplinary panel ultimately suspended Borovac for the remainder of the school year, but permitted  
10 him to finish his education through CCSD's distance education program.

11 On May 10, 2011, Borovac filed a complaint against defendants alleging five causes of  
12 action: (1) Due Process violation; (2) breach of contract; (3) negligent hiring, training, and  
13 supervision; (4) intentional infliction of emotional distress; and (5) injunctive and declaratory  
14 relief. Doc. #1. Thereafter, defendants filed the present motion to dismiss. Doc. #11.

## 15 **II. Legal Standard**

16 Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure  
17 to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state  
18 a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading  
19 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That  
20 is, a complaint must contain "a short and plain statement of the claim showing that the pleader is  
21 entitled to relief." Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require  
22 detailed factual allegations; however, a pleading that offers "'labels and conclusions' or 'a  
23 formulaic recitation of the elements of a cause of action'" will not suffice. *Ashcroft v. Iqbal*, 129 S.  
24 Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

25 Furthermore, Rule 8(a)(2) requires a complaint to "contain sufficient factual matter,  
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1 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting  
2 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows  
3 the court to draw the reasonable inference, based on the court’s judicial experience and common  
4 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility  
5 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a  
6 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a  
7 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to  
8 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

9 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as  
10 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of  
11 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*  
12 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)  
13 (internal quotation marks omitted). The court discounts these allegations because “they do nothing  
14 more than state a legal conclusion—even if that conclusion is cast in the form of a factual  
15 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to  
16 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be  
17 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

### 18 **III. Discussion**

#### 19 **A. Due Process**

20 In his complaint, Borovac argues that defendants violated his procedural Due Process rights  
21 when (1) he was suspended from school for ten (10) days without notice; (2) was denied an  
22 opportunity to review the evidence against him prior to his formal disciplinary hearing; (3) and was  
23 disciplined twice for the same offense. *See* Doc. #1. Borovac further alleges that his substantive  
24 Due Process rights were violated because his suspension was not rationally related to his  
25 underlying conduct, but was instead a response to increased media attention about the incident and  
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1 public backlash at administrators. *Id.*

## 2 **1. Ten (10) Day Suspension**

3 Nevada law provides that a student shall not be suspended from school or expelled from the  
4 school district until the student has been given notice and an opportunity to be heard.

5 NRS § 392.467(2). However, constitutional due process for school suspensions does not require a  
6 formal hearing. *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 86 (1978). For any  
7 suspension up to ten (10) days, due process requires only that a student “be given oral or written  
8 notice of the charges against him and, if he denies them, an explanation of the evidence the  
9 authorities have and an opportunity to present his side of the story.” *Goss v. Lopez*, 419 U.S. 565,  
10 581 (1975). This can be accomplished by an “‘informal give-and-take’ between the student and the  
11 administrative body dismissing him that would, at least, give the student ‘the opportunity to  
12 characterize his conduct and put it in what he deems the proper context.’” *Bd. of Curators of Univ.*  
13 *of Missouri*, 435 U.S. at 86.

14 In his complaint, Borovac alleges that the received no notice of the possibility of further  
15 discipline when he was again interviewed by defendant Lords on December 21, 2010. *See* Doc. #1.  
16 The court has reviewed the allegations in Borovac’s complaint and finds that he has sufficiently  
17 alleged that he had no notice that the December 21, 2010 meeting could result in further discipline.  
18 As such, the court finds that he has sufficiently alleged a claim for violation of his procedural Due  
19 Process rights arising from the ten (10) day suspension.

## 20 **2. January 24, 2011 Hearing**

21 For suspensions longer than ten (10) days, constitutional Due Process requires additional  
22 procedural protections including representation by counsel, the ability to present witnesses, and the  
23 ability to cross-examine adverse witnesses. *See e.g., Black Coal v. Portland Sch. Dist. No. 1*, 484  
24 F.2d 1040, 1044 (9th Cir. 1973).

25 In his complaint, Borovac alleges generally that he did not have an opportunity to review  
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1 the evidence against him before his formal disciplinary hearing on January 24, 1011. However,  
2 there are no specific allegations as to what evidence he was denied or how that denial deprived him  
3 of his Due Process rights, especially in light of the fact this it was his own confession to Lords that  
4 served as the basis for the hearing. Therefore, the court finds that Borovac has failed to sufficiently  
5 allege a Due Process violation arising from his formal disciplinary hearing.

### 6 **3. Double Jeopardy Claim**

7 In his complaint, Borovac further alleges that his Due Process rights were violated when he  
8 was disciplined twice for the same offense. *See* Doc. #1. However, there is no legally cognizable  
9 claim for “double jeopardy” in the student discipline context. The double jeopardy clause of the  
10 Fifth Amendment “protects only against the imposition of multiple criminal punishments for the  
11 same offense.” *Hudson v. United States*, 522 U.S. 93, 99 (1997). The discipline meted out in this  
12 case was civil. Therefore, Borovac fails to state a claim upon which relief can be granted.

### 13 **4. Substantive Due Process**

14 In his complaint, Borovac alleges that defendants also violated his substantive Due Process  
15 rights because the basis of his expulsion was not rationally related to his offense, but was based  
16 upon information falsely reported in the media and the disciplinary board’s desire for political gain.  
17 *See* Doc. #1.

18 The court has reviewed the allegations in Borovac’s complaint and finds that he has  
19 sufficiently alleged that his suspension, after already having served his initial discipline, was not  
20 rationally related to his offense, but was the result of media and public pressure on CCSD  
21 administrators. Therefore, the court finds that Borovac has sufficiently alleged a claim for violation  
22 of his substantive Due Process rights.

### 23 **B. Breach of contract**

24 In his complaint, Borovac alleges that defendants breached the guidelines of the student  
25 athlete handbook. *See* Doc. #1. However, there is no express or implied contract between public  
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1 secondary schools and their students as a result of a student handbook, including a sport's team  
2 code of conduct. *See Brodeur v. Claremont Sch. Dist.*, 626 F. Supp. 2d 195, 217-218 (D. N.H.  
3 2009). Therefore, the court finds that Borovac fails to state a claim for breach of contract.

#### 4 **C. Negligent Hiring, Training, and Supervision**

5 “The tort of negligent hiring imposes a general duty on the employer to conduct a  
6 reasonable background check on a potential employee to ensure that the employee is fit for the  
7 position.” *Burnett v. C.B.A. Sec. Serv., Inc.*, 820 O.2d 750 (pin cite) (Nev. 1991). An employer  
8 breaches this duty if he hires an employee when he knew or should have known of the employee's  
9 dangerous propensities. *Hall v. SSF, Inc.*, 930 P.2d 94 (pin cite) (Nev. 1996).

10 Negligent training and negligent supervision are similar claims. Under Nevada law,  
11 employers have a duty to properly train and supervise their employees. *Jespersion v. Harrah's*  
12 *Operating Co.*, 280 F. Supp. 2d 1189, 1194-95 (D. Nev. 2002). Negligent training is characterized  
13 as a the failure to use due care in giving directions or the failure to anticipate circumstances that are  
14 likely to arise. Negligent supervision occurs when an employer fails to anticipate foreseeable  
15 employee misconduct or fails to take reasonable precautions to protect third parties.

16 In his complaint, Borovac alleges generally that CCSD hired employees with a propensity  
17 towards committing unlawful acts. *See* Doc. #1. However, Borovac fails to allege that CCSD had  
18 any knowledge that its employees would act unlawfully or that CCSD hired any employees  
19 knowing of their propensity to commit unlawful acts. Therefore, the court finds that Borovac has  
20 failed to sufficiently allege a claim for negligent hiring, training, and supervision.

#### 21 **D. Intentional Infliction of Emotional Distress**

22 To establish a claim for intentional infliction of emotional distress, a plaintiff must show:  
23 (1) extreme or outrageous conduct by defendant; and (2) plaintiff suffered severe emotional  
24 distress. *Dillard Dept. Stores, Inc. v. Beckwith*, 989 P.2d 882, 886 (Nev. 1999). Extreme and  
25 outrageous conduct is that which is “outside all possible bounds of decency” and is intolerable in  
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1 civil life. *Maduike v. Agency Rent-A-Car*, 953 P.2d 24, 25 (Nev. 1998).

2 Here, there are no allegations that defendants acted in a manner that was outside all possible  
3 bounds of decency when disciplining Borovac for hazing and sexually harassing another student.  
4 Therefore, the court finds that Borovac fails to state a claim upon which relief can be granted.

5 **E. Injunctive and Declaratory Relief**

6 Claims for injunctive or declaratory relief are remedies that may be afforded to a party after  
7 he has sufficiently established and proven his claims; they are not separate causes of action. *See*  
8 *e.g., In re Wal-Mart & Hour Employment Practices Litig.*, 490 F. Supp. 1091, 1130 (D. Nev. 2007)  
9 (holding that a claim for injunctive relief was not a separate cause of action or independent ground  
10 for relief). Accordingly, the court shall dismiss these claims.

11  
12 IT IS THEREFORE ORDERED that defendant's motion to dismiss (Doc. #11) is  
13 GRANTED in-part and DENIED in-part in accordance with this order. Plaintiff's claims for breach  
14 of contract; negligent hiring, training, and supervision; intentional and negligent infliction of  
15 emotional distress; injunctive and declaratory relief; procedural Due Process arising from the  
16 January 24, 2011 disciplinary hearing; and double jeopardy Due Process are DISMISSED from  
17 plaintiff's complaint (Doc. #1). Plaintiff's claims for procedural Due Process violation arising from  
18 his ten (10) day suspension and substantive Due Process are NOT DISMISSED.

19 IT IS SO ORDERED.

20 DATED this 27th day of January, 2012.



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23 LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE  
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